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SOCIAL, HUMANITARIAN AND HUMAN RIGHTS QUESTIONS:
HUMAN RIGHTS QUESTIONS

Follow-up and monitoring of the International Covenant on Economic, Social and Cultural Rights

Report of the Secretary-General

SUMMARY

The Economic and Social Council, in its resolution E/1996/38 adopted on 26 July 1996 without a vote, noting that the provisions concerning the follow-up and monitoring of the International Covenant on Economic, Social and Cultural Rights were not consistent with those in other human rights treaties, requested the Secretary-General to submit to the Council, at its resumed substantive session of 1996, a report on the legal procedure necessary to bring the Committee on Economic, Social and Cultural Rights in line with other similar human rights treaty bodies.

The present report is submitted by the Secretary-General in response to that request.

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I. LEGAL STANDING OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. The Committee on Economic, Social and Cultural Rights is the only monitoring body within the United Nations human rights treaty system whose establishment has not been provided for in the relevant treaty - the International Covenant on Economic, Social and Cultural Rights 1/ (hereinafter referred to as the Covenant). In fact, the Covenant, in contrast to other human rights treaties, confers on the Economic and Social Council in general terms the task of monitoring state compliance in accordance with its overall responsibilities under the Charter of the United Nations in the field of human rights.

2. In the absence of an indication in the Covenant concerning the establishment of a monitoring body with clearly defined functions, the Council undertook very soon after the entry into force of the Covenant, on 3 January 1976, to fill these lacunae in the text of the treaty by way of resolutions and decisions, most importantly Council resolution 1988 (LX) of 11 May 1976; decision 1978/10 of 3 May 1978; resolution 1979/43 of 11 May 1979; decision 1981/158 of 8 May 1981; resolution 1982/33 of 6 May 1982; resolution 1985/17 of 28 May 1985; decision 1985/132 of 28 May 1985; decision 1986/102 of 7 February 1986; resolution 1988/4 of 24 May 1988; resolution 1995/39 of 25 July 1995; and decisions 1995/302 and 303 of 25 July 1995.

3. In those resolutions and decisions, the Council dealt with the following procedural issues relating to the implementation of the Covenant:

(a) Reporting obligations of States parties (resolution 1988 (LX), decision 1985/132, resolutions 1988/4 and 1995/39);

(b) Establishment of a special monitoring body (initially, the sessional working group on the implementation of the International Covenant on Economic, Social and Cultural Rights; then the Committee on Economic, Social and Cultural Rights) in order to assist the Council in the consideration of reports submitted by States parties and in fulfilling other responsibilities, particularly those under articles 21 and 22 of the Covenant (decisions 1978/10 and 1981/158, resolutions 1982/33 and 1985/17);

(c) Methods of work of the Sessional Working Group/Committee on Economic, Social and Cultural Rights (resolution 1979/43, decision 1981/158, resolutions 1982/33, 1985/17 and 1988/4);

(d) Sessions of the Sessional Working Group/Committee on Economic, Social and Cultural Rights (resolutions 1979/43, 1985/17 and 1995/39);

(e) Emoluments for Committee members (decision 1995/302).

4. While all those procedural aspects are covered in a special chapter (comprising a number of articles) in other principal human rights treaties, in the case of the Committee on Economic, Social and Cultural Rights, which does not have a treaty-based standing, more than a dozen Council resolutions and

decisions were needed to complement the text of the Covenant on Economic, Social and Cultural Rights. Owing to this special "legal" situation, a decision by the Council could terminate the Committee's existence. Accordingly, it may be appropriate to codify, through available legal procedures, the "normative" work accomplished by the Council since the entry into force of the Covenant, thus bringing the Committee on Economic, Social and Cultural Rights into line with other similar human rights treaty bodies.

5. The reasons for such an action are manifold:

(a) The Committee on Economic, Social and Cultural Rights, despite its non-treaty-based status, has performed its supervisory functions de facto for 10 years during which period it has developed expertise in promoting and protecting economic, social and cultural rights;

(b) Such an action is explicitly called for by the Vienna Declaration and Programme of Action 2/ which in its paragraph I.5 reaffirms that all human rights are universal, indivisible, interdependent and interrelated, and that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis;

(c) The provisions contained in the International Covenant on Economic, Social and Cultural Rights for monitoring implementation do not adequately describe the range of functions that must be carried out by a human rights treaty monitoring body;

(d) Within the present regime no provision is made for a meeting of States parties;

(e) Under the existing resolution-based regime, there exists an element of uncertainty, in legal terms, as to the long-term continuation of the Committee on Economic, Social and Cultural Rights. This has manifested itself most recently in the Committee's discussion on a draft optional protocol that would provide for the consideration by the Committee of communications (Vienna Declaration and Programme of Action, para. II.75). The Committee has clearly indicated its preoccupation with its ambiguous status with respect to the Covenant owing to the deficiencies of the latter, as follows:

> "... the Economic and Social Council remains the formally designated supervisory body under the terms of the Covenant and ... the Committee's role is dependent upon its continuing to be the body to which this function has been delegated by the Council ... Since the Committee is formally a creation of the Council it retains the right to disband it" (E/C.12/1994/12, para. 17) (emphasis added);

(f) Committee members who have addressed the issue in the context of the Committee's debates have supported the idea of bringing the Committee on Economic, Social and Cultural Rights in line with other similar human rights treaty bodies.

II. LEGAL PROCEDURES AVAILABLE TO BRING THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN LINE WITH OTHER SIMILAR HUMAN RIGHTS TREATY BODIES

6. To bring the Committee on Economic, Social and Cultural Rights in line with other similar human rights treaty bodies can be achieved only through granting the Committee a treaty-based status. Such action would require amending the International Covenant on Economic, Social and Cultural Rights. Such an amendment, in technical terms, can be brought about either by amending the existing text (part IV of the Covenant) or by adopting an additional protocol to the Covenant. In the latter case, it should be noted that the conclusion of an additional protocol in order to establish a treaty-based human rights monitoring body would also entail amendment of the Covenant in order to, inter alia, define the new role of the Economic and Social Council, if any, once the treaty-based monitoring body was established. In the light of the foregoing the protocol option is not discussed in this report.

7. In this connection, attention is drawn to the relevant provisions of the Covenant and the Vienna Convention on the Law of Treaties. 3/

8. Article 29 of the Covenant establishes the following procedure for amending that treaty:

> "1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
>
> "2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
>
> "3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted."

9. Part IV of the Vienna Convention on the Law of Treaties entitled "Amendment and modification of treaties" provides the following general universally recognized rules for the same process:

"ARTICLE 40. AMENDMENT OF MULTILATERAL TREATIES

"1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

"2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

"(a) The decision as to the action to be taken in regard to such proposal;

"(b) The negotiation and conclusion of any agreement for the amendment of the treaty.

"3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

"(a) be considered as a party to the treaty as amended; and

"(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

10. In accordance with the above provisions, the amendment process consists of three phases: (a) elaboration and adoption of the amendment by the States parties, (b) approval of the amendment by the General Assembly and (c) entry into force of the amendment.

11. The first phase comprises the following consecutive actions:

(a) Formal proposal of an amendment by a State party through filing it with the Secretary-General of the United Nations who is depositary of this treaty; 4/

(b) Communication by the Secretary-General of the proposed amendment to the States parties to the Covenant with the request that they notify him whether they favour a conference of States parties for the purpose of considering and voting upon the proposal;

(c) Convening of a conference in the event that at least one third of the States parties favour such a conference; 5/

(d) Discussion and adoption of the amendment by a majority of the States parties present and voting at the conference;

(e) Submission of the adopted text to the General Assembly for approval.

12. The second phase consists of the following action: approval by the General Assembly.

13. The third phase consists of the following action: acceptance by a two-thirds majority of the States parties in accordance with their respective constitutional processes. 6/

14. Recent practice of amending human rights treaties has shown that going through the first and second phases usually takes approximately one year. Entry into force, however, which requires acceptance by a two-thirds majority of States parties, may be delayed indefinitely.

15. In the latter connection, amendments to the International Convention on the Elimination of All Forms of Racial Discrimination 7/ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 8/ which were taken note of by the General Assembly in 1992 but have not yet entered into force, are illustrative. In the first instance, out of 95 ratifications needed, at present, only 17 have been notified to the Secretary-General. In the second case, 45 ratifications were required and only 17 have at present been notified.

16. It should be noted that in both cases an interim solution, pending entry into force of the amendments, was chosen by means of a resolution of the General Assembly.

17. In light of the above and on the assumption that the eventual amendments to the Covenant would have been approved by the General Assembly, similar action could be taken by the Assembly for the application on an interim basis of the provisions contained in such amendments.

18. It should be pointed out that once an amendment enters into force, it is binding only on the States parties that have accepted it. Therefore unless all States parties accept the amendment, a dual regime could emerge. However, given the nature of the amendment under consideration, the dual regime cannot be sustained. The relevant monitoring body cannot be at the same time the new treaty-based monitoring body for some States parties and the Committee on Economic, Social and Cultural Rights for the remaining States parties.

III. PROBLEMS TO BE ADDRESSED IN AMENDING THE COVENANT

19. Based on an analysis of pertinent resolutions and decisions of the Economic and Social Council and relevant parts of human rights treaties under which monitoring mechanisms have been established, the issues that should be addressed in amending the Covenant, with a view to bringing the Committee on Economic, Social and Cultural Rights in line with other similar human rights treaty bodies, have been identified as follows (the numbers followed by an asterisk (*) correspond to those issues that have already been covered in resolutions and decisions of the Council):

1. Establishing a meeting of States parties

2. Election of Committee members by the meeting of States parties

3*. Principle of an equitable geographical distribution

4*. Rules of procedure

5. Privileges and immunities

6. Emoluments

7*. Sessions

8*. Venue of the meetings of the Committee

9*. Cooperation with specialized agencies and others

10*. Annual report

11*. Reporting obligations of States parties

12*. Obligation of States parties to make reports widely available to the public in their own countries

13*. Cooperation with non-governmental organizations

14*. Secretariat assistance

IV. INTERIM SOLUTIONS

20. Pending the entry into force of the amendments, that is, after their adoption by a majority of the States parties and after their approval by the General Assembly, but prior to their acceptance by a two-thirds majority of the States parties, the Economic and Social Council or the Assembly could, by appropriate action, give effect to the provisions of those amendments. In practical terms, this would mean deciding that members of the Committee would be elected by a meeting of States parties to the Covenant; requesting the Secretary-General to ensure convocation of such a meeting at an appropriate date; and providing that emoluments of the same order as those paid to members of the Human Rights Committee are paid to the members of the Committee on Economic, Social and Cultural Rights. 9/ It should be noted, however, that the Committee on Economic, Social and Cultural Rights would remain a subsidiary of the Council and would therefore continue to report and be subject to the authority of the Council.

V. PROVISIONS REGULATING THE STATUS OF TREATY-BASED BODIES

21. The provisions of the following instruments regulate the status of treaty-based bodies:

1. International Covenant on Economic, Social and Cultural Rights
   Part IV: articles 16-23

2. International Covenant on Civil and Political Rights 10/
   Part IV: articles 28-40 and 45

3. International Convention on the Elimination of All Forms of Racial Discrimination
   Part II: articles 8-10

4. Convention on the Rights of the Child 11/
   Part II: articles 43-45

5. Convention on the Elimination of All Forms of Discrimination Against Women 12/
   Part V: articles 17-22

6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
   Part II: articles 17-24

7. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (not yet in force) 13/
   Part VII: articles 72-75

Notes

1/ See General Assembly resolution 2200 A (XXI), annex.

2/ Report of the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/24 (Part I), chap. III.

3/ United Nations, Treaty Series, vol. 1155, No. 18232.

4/ A draft amendment is usually prepared by a State party; by the United Nations Secretariat (Centre for Human Rights); or by the Committee itself (the Committee may be asked to prepare such a draft).

5/ In the case of the International Covenant on Economic, Social and Cultural Rights, 45 States parties.

6/ At present, by 90 States parties.

7/ General Assembly resolution 2106 (XX), annex.

8/ General Assembly resolution 39/46, annex.

9/ The next elections for membership in the Committee are scheduled to be held in 1998.

10/ See General Assembly resolution 2200 A (XXI), annex.

11/ General Assembly resolution 44/25, annex.

12/ General Assembly resolution 34/180, annex.

13/ General Assembly resolution 45/158.